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No. 79-350

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

CHARLES R. BUCK, JR., Sc.D., SECRETARY
OF HEALTH AND MENTAL HYGIENE
OF THE STATE OF MARYLAND

Petitioner,

v.

BETTY KIMBLE, HORACE LANCASTER,
THELMA EATON, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Where the District Court found that Maryland's Secretary of Health and Mental

Hygiene had unlawfully instituted reductions in the scope of Medicaid benefits by failing to provide advance notice to Medicaid recipients as required by federal regulations, does the Eleventh Amendment prevent the District Court from ordering prospective reinstatement of benefits for approximately ten days so as to provide recipients with the opportunity for care they would have received had the required notice been given?

STATEMENT OF THE CASE

Petitioner's statement of the case requires clarification in two respects.

A. The Relief Ordered by the Court of Appeals

The Court of Appeals found that the failure to give advance notice of the reductions "was not a mere technical or procedural default, but rather resulted in the loss to Medicaid recipients of important substantive rights.... Thus, the mailing of an adequate and timely notice to Medicaid recipients would have informed them that certain types

of medical services would have to be sharply curtailed within a few days and that any recipients in need of such services should obtain them promptly, while benefits remained available." (App. 29a-30a).*/

The relief ordered provides this opportunity by ordering prospective reinstatement of benefits limited to medical services received after the district court enters its decree and continuing until ten days after Maryland gives notice of the temporary restoration. App. 32a. The temporarily restored benefits are to be provided only to those who were both Medicaid recipients when benefits were illegally reduced and who are also Medicaid recipients at the time of restoration.

B. The Obligation to Provide Notice to Medicaid Recipients Was Clearly Established Prior to the Reductions Herein

Contrary to the implications of the petition, the obligation to provide ten days

*/ References to "App." refer to the Appendix to the Petition for Certiorari.

prior written notice to all recipients of reductions in benefits was clearly stated in the federal regulations in November, 1975 when the reductions herein were proposed. 45 C.F.R. §205.10(a)(4) provides:

> (4) In cases of intended action to discontinue, terminate, suspend or reduce assistance:
>
> (i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a)(4)(ii),(iii), or (iv) of this section. Under this requirement:
>
> (A) "Timely" means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective;
>
> (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested;
>
> * * *
>
> (iii) When changes in either State or Federal law require automatic grant adjustments for classes of

> recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

Moreover, as early as 1973, the Third Circuit had held that both notice and opportunity for hearing was required by this regulation. Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973).*/ Thus, the failure of Maryland to give notice was not the result of a sudden change in law but rather the product of a deliberate or negligent omission on the part of the State.

REASONS FOR DENYING THE WRIT

1. The Prospective Temporary Reinstatement of Medicaid Benefits is Consistent with the Decisions of this Court

The three decisions of this Court, directly on point, repeatedly emphasize

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*/ The regulation applies to both the Medicaid program and the AFDC program for public assistance, the latter being involved in Rochester v. Baganz.

the crucial difference between the retroactive award of accrued monetary liability and prospective relief which may involve payment of funds from the state treasury. Edelman v. Jordan, 415 U.S. 651 (1974); Milliken v. Bradley, 433 U.S. 267 (1977); Quern v. Jordan, ___ U.S. ___, 99 S.Ct. 1139 (1979). In Milliken v. Bradley, this Court summarized Edelman as barring "'the award of an accrued monetary liability ...' which represented 'retroactive payments,'" 433 U.S. 289, but permitting a suit "to the extent it sought 'payment of state funds... as a necessary consequence of compliance in the future with a substantive federal-question determination...'" 433 U.S. at 289 (emphasis in original).

The Court of Appeals paid heed to the distinction. It noted that two forms of relief were appropriate but the Eleventh Amendment permitted only one to be awarded. The Court of Appeals rejected payment to recipients who had managed to obtain medical services despite the reductions in Medicaid benefits as inconsistent with the Eleventh

Amendment but approved prospective relief for those recipients who receive services after the district court's order on remand. App. 30a. The Court of Appeals concluded

> "By contrast, the eleventh amendment offers no impediment to the second, prospective component of relief outlined above. This prospective relief looks to the future and requires payments only for medical services received after entry of the district court's decree. Such relief would hardly constitute 'the award of an accrued monetary liability.' To the contrary, the state's liability for payments would not be fixed until recipients seek and receive medical services after the district court has entered its order."

The Court of Appeals analysis is consistent with, indeed required by, this Court's decision in Milliken v. Bradley, 433 U.S. 267 (1977). In Milliken, the Court approved a District Court order that directed an official of the State of Michigan to use state funds, in the future, to pay one-half the cost of a remedial program in the Detroit schools. The program was to benefit students who had been victimized by racial discrimination in the past. The Court stated that "the prospective-compliance exception reaffirmed by Edelman...permits

federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." 433 U.S. at 289.

Furthermore, the Court in Milliken refused to draw an artificial line between permissible and impermissible relief by distinguishing between relief that is compensatory and relief that is not. The remedial program ordered by the decree was intended to benefit "the victims of Detroit's de jure segregated system." 433 U.S. at 290. "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment." Id. So too in the case at bar, offering the opportunity to some Medicaid recipients to obtain medical services prematurely cut off does not change the fact that a decree may be framed "that operates prospectively

to bring about the delayed benefits" of the notice requirement.

The relief awarded by the Court of Appeals is, in fact, not compensatory in nature. Thousands who were eligible for Medicaid in 1976 but are no longer eligible will receive no benefit. Medicaid recipients who received no dental care when needed in January 1976 but who may not require such care now will receive no compensation. Others who somehow obtained funds or incurred liabilities in order to receive dental or other care in January 1976 will also not receive retroactive reimbursement.

2. The Prospective Relief Awarded Leaves the State the Option of Complying with the Decree Without Additional Expenditures of State Funds

The Medicaid program is both voluntary on the part of Maryland and allows the State considerable discretion in the scope of benefits awarded. Accordingly, Maryland could if it wished comply with the decree without any additional expenditures for its Medicaid program other than those already appropriated by the legislature, by simply reducing other benefits temporarily. As

the facts here show, in Maryland benefits are reduced by administrative action and no legislation is required. Of course, respondent Medicaid recipients hope and expect that the State will not choose that method of compliance with the decree, particularly since the actual amount of money involved will be less than one percent of the total Medicaid budget, see infra, p. 11. But from the standpoint of the Eleventh Amendment, the decree can be met without any additional call on the state treasury if Maryland so wishes. Prospective relief offers the state a choice of action under which the state may avoid any intrusion on its treasury as a result of the decree. Thus, it is not surprising that in similar Medicaid reduction cases, the courts have awarded prospective relief restoring benefits until compliance with notice requirements. Benton v. Rhodes, Medicare and Medicaid Guide (CCH) ¶28,025 (S.D. Oh. 1976); reversed on other grounds, 586 F.2d 1 (6th Cir. 1978); Robinson v. Maher, Medicare and Medicaid Guide (CCH) ¶27,707 (D. Conn. 1976). Cf. Indiana

State Employees Ass'n, Inc. v. Boehning, 511 F.2d 834 (7th Cir. 1975) rev'd on other grounds, 423 U.S. 6 (1975) and Assaf v. University of Texas System, 399 F. Supp. 1245 (S.D. Tex. 1975), holding that the Eleventh Amendment does not prevent an injunction continuing employment of employee discharged without hearing although an award of back pay is prohibited.

3. The Amount of Funds Involved In the Case Is Inconsequential

Although the record does not indicate the precise cost of providing the restored benefits, it does reveal that the cost is inconsequential to the state. The reductions in benefits were made in response to a nine million dollar budgetary deficit, of which $6.5 million was met by an additional appropriation and only $2.5 million by the reductions. Petition for Certiorari, p. 3. Even if the restored services were to cost nine million dollars on an annual basis, the cost for a ten day restoration would likely not exceed five hundred thousand dollars, a drop in the bucket for a Medicaid program which spent $239 million

in fiscal 1976. In addition, half the cost of the benefits will be paid by the federal reimbursement under the Medicaid program, so that in practical dollar terms this case is of no significance to the State of Maryland.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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